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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

ELBERT B. SCHINMANN AND TEDDIE SCHINMANN,
Petitioners,

VS.

THE UNITED STATES,
Respondent

H.F. ALLEN ORCHARDS, et al.,
Petitioners,

VS.

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Ninth Circuit erred in holding that gross negligence in computing irrigation water supply (hydrological malpractice) is immunized under the misrepresentation exception to the Federal Tort Claims Act [28 U.S.C. § 2680(h)], when the gross negligence, which caused catastrophic losses, was committed pursuant to government reclamation authority affecting water users throughout the Western United States.

Whether the Ninth Circuit created an intolerable conflict by holding, under the misrepresentation exception, that hydrological malpractice is not actionable, when other circuit courts have held actionable substantially similar types of malpractice committed in performing operational tasks.

Whether the Ninth Circuit's decison squarely conflicts with *Indian Towing Company v. United States,* 350 U.S. 61 (1955) and *Block v. Neal,* 460 U.S. 289 (1983).

Whether the Ninth Circuit misapplied the misrepresentation exception in view of:

- the existing special relationship of trust between the Bureau of Reclamation and the Western Farmers;

- the complete control which the Bureau exercises over the Farmers' irrigation water; and

- the Farmers' total dependency on the Bureau for their irrigation water supply.

* * * *

PARTIES

Petitioners (hereafter "the Farmers") are 334 individuals and other entities who farm in the Yakima Basin in Eastern Washington. The Farmers are water users who own rights in irrigation water which is controlled and allocated by the Bureau of Reclamation. The Farmers were plaintiffs in two consolidated cases in the United States District Court for the Eastern District of Washington, and appellants in the United States Court of Appeals for the Ninth Cirucit. Each of the Farmers is identified by name at pages A-27 through A-32 of Appendix D.

Respondent is the United States of America, acting through the Bureau of Reclamation of the Department of Interior (hereafter "the Bureau"). Respondent was defendant in the United States District Court for the Eastern District of Washington, and appellee in the United States Court of Appeals for the Ninth Circuit.

* * * *

The Farmers respectfully pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Washington, dated September 18, 1985, is reported at 618 F.Supp. 1030 (E.D.Wash. 1985) and is pages A-6 through A-23 of Appendix B.

The unpublished memorandum opinion of the United States Court of Appeals for the Ninth Circuit, dated February 18, 1987, is pages A-1 through A-5 of Appendix A.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on February 18, 1987. A petition for rehearing with suggestion for rehearing *en banc* was timely filed. On May 1, 1987, the Court of Appeals entered an order denying that petition (the Order denying the Petition for Rehearing is page A-26 of Appendix C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The statutes involved in this case include 28 U.S.C. §§ 2674 and 2680(h) of the Federal Tort Claims Act.

28 U.S.C. § 2674 states:

> *Liability of United States*
>
> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

* * *

28 U.S.C. § 2680(h) states in pertinent part:

> *Exceptions*
>
> The provisions of this chapter and section 1346(b) of this title shall not apply to . . .
>
> (h) Any claim arising out of . . . misrepresentation[.]

STATEMENT OF THE CASE

A. The Nature of the Special Relationship Between the Bureau and the Farmers

The issue presented here is whether the Bureau is responsible for its hydrological malpractice when it failed, by a grossly negligent computational error, to accurately compute the total water supply available to the Farmers. This is an issue of great importance not only to the Farmers, but also to all irrigation water users throughout the arid Western United States, where agriculture is, in essence, a function of government-constructed irrigation systems. In Eastern Washington, as in other parts of the West, irrigation water, which the Bureau controls, is the economic lifeblood of the Farmers.[1]

This case arises in the Yakima River Basin in Eastern Washington, where there would be no agriculture but for irrigation. Pursuant to the Reclamation Act of 1902, 43 U.S.C. §§ 371 *et seq.*, irrigation systems were established in the Yakima Basin as they were throughout the West.

In spite of its natural aridity, the Yakima Basin has become, through the use of irrigation, the center of the celebrated Washington apple industry, and a substantial source of other water-intensive crops. Irrigation water distributed through and by the Yakima Project[2] is therefore vital to the Yakima River Basin.

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[1] Because this is a review of a summary judgment, the Farmers are entitled to have the facts stated in the light most favorable to them. However, an effort has been made to make this presentation accurate, balanced and fair. To the degree that disputed issues of material facts exist (and there are many of these) the lower courts, of course, erred on a ground wholly independent of those here presented, in granting summary judgment.

[2] A schematic map of the Project is found at Appendix E, page A-50. It is part of a document entitled "Review of 1977 Water Supply Estimates Yakima River Basin, June, 1977", and referred to consistently in the record as "the Vissia Report." Although produced internally, the Vissia Report acknowledges the computational error herein described. It is the Bureau's concession of its own negligence.

There is no alternative economical water source of substance available to the Farmers.

The principal actors in the reclamation process are (1) the Farmers, who actually perform the reclamation and ultimately pay for all services which the government supplies, and (2) the Bureau, which acts as a common carrier and distributor of the water to the Farmers. The Bureau supplies water to the Farmers pursuant to a series of repayment and supply contracts with reclamation and irrigation districts[3] of which the Farmers are members, and the terms of a 1945 Consent Decree of the United States District Court for the Eastern District of Washington, which determined the respective water rights of the users of the Yakima River and its tributaries.[4]

The Farmers own the water. The Bureau has no rights in the water it distributes. Its function is that of a carrier and distributor of the water. *Ickes v. Fox,* 300 U.S. 82, 95 (1937).

For over half a century, the Bureau has had exclusive control over how much water the Farmers receive during their growing season. Because of the Bureau's exclusive control over water allocation to the Farmers, the Bureau and Farmers stand, in effect, in a special, fiduciary relationship to each other with respect to the Yakima Project. This Court has repeatedly acknowledged that the Bureau's responsbility to the Farmers is a

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[3] Reclamation and irrigation districts facilitate the central task of the reclamation enterprise. Districts do not determine the amount of water to transmit, nor when to transmit it, nor its destination, nor its ultimate use. "[T]he ultimate purpose of an irrigation district is to provide water for the purpose of irrigating lands within its boundaries." *Beasly v. Assets Conservation Company,* 131 Wash. 439, 230 P. 411 (1924). *See also Salyer Land Company v. Tulare Lake Basin Water Storage District,* 410 U.S. 719, 728-729 (1973), which recognizes the limited and derivative nature of reclamation districts.

[4] The 1945 Consent Decree is reprinted at Appendix F, pages A-67 through A-99. A representative repayment contract, the Amendatory Repayment Contract Between the United States of America and the Roza Irrigation District is reprinted at Appendix L, pages A-148 through A-182.

special relationship of trust. *See e.g. Nevada v. United States,* 463 U.S. 110, 126-128 (1983); *State of Nebraska v. State of Wyoming,* 325 U.S. 589, 614-615 (1945); *Ickes v. Fox,* 300 U.S. 82, 95 (1937); *Ide v. United States,* 263 U.S. 497, 505-506 (1924).

B. The Bureau's Gross Negligence In Computing The Total Water Supply Available

A Consent Decree and Judgment entered in the Federal District Court for the Eastern District of Washington on January 31, 1945, in *Kittitas Reclamation District v. Sunnyside Valley Irrigation District,* Civil Action No. 21 (*see* Appendix F), determined the respective water rights of the users of the Yakima River and its tributaries. Because of a comparatively dry fall and early winter in 1976, the Bureau decided to invoke the provisions of paragraph 18 of the Consent Decree, which set forth a method for calculation of the Total Water Supply Available (hereafter "TWSA"). This computation is an essential step in the allocation of water in times of short supply.

In February 1977, at a time when the Farmers needed to know the amount of water that would be available to them, the Bureau erroneously computed the TWSA. Based upon that erroneous computation, the Bureau stated that it would surrender to the Farmers only seven percent (7%) of the water to which they were entitled.

The Bureau's erroneous computation of the TWSA[5] was a mechanical act of malpractice on an operational level. The computation, according to an affidavit of a noted hydrological

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[5] It is not necessary that the particulars of this tragic sequence be spelled out in this document. The errors did not involve arcane formulae or esoteric knowledge on the cutting edge of science. There were in fact two distinct errors. One error was simply overlooking one factor (return flow from irrigation waters) in a simple three-factor formula. Vinsonhaler Deposition, Appendix H, page A-115. The Bureau acknowledges that return flow is a necessary, and *obviously* necessary component of a correct TWSA computation. The other was making a knowing choice to rely on guesses as to runoff where computations could and should have been made. Exhibit 2 to Vissia Deposition, Appendix H, A-122 through A-123.

expert, is not even particularly sophisticated, but rather is "a standard and accepted part of hydrology and water resource management" involving "fixed and ascertainable standards." Declaration of John A. Dracup, at Appendix G, page A-109.

By year's end, the Bureau made available to the Farmers eighty-three percent (83%) of their water entitlement, which was enough to meet one hundred percent (100%) of their historic needs. But by then it was too late. The Farmers were then unable to use the water. Because the Farmers must make their planning decisions early in the year, the Bureau's faulty computation in early February left the Farmers with only one option: to take prudent mitigating actions such as allowing land to lie fallow, reducing acreage of normal plantings, substituting less lucrative crops requiring smaller amounts of water, and drilling wells—in a desperate attempt to mitigate the looming disaster. The result was a multi-million dollar catastrophe.

C. Proceedings Below

After the United States denied their timely administrative claims, petitioners filed suit in the district court under the Federal Tort Claims Act (hereafter "FTCA"). By agreement of the parties, the district court cases were held in abeyance while a contract action filed in the United States Claims Court was litigated.[6]

The district court then granted summary judgment for the government, holding that the action was barred by the misrepresentation and discretionary function exceptions to the FTCA, 28 U.S.C. § 2680(h) and (a). Appendix B, pages A-6 through A-23.[7]

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[6] The Claims Court action was dismissed. 4 Cl.Ct. 601 (1984). This dismissal was affirmed by the United States Court of Appeals for the Federal Circuit, holding that no contractual duty exists to project the total water supply available accurately. 749 F.2d 1571 (1984). This Court subsequently denied a Petition for Certiorari in the Claims Court case. Thus, this petition presents the last opportunity for the courts to give relief to the Farmers for the damage the Bureau inflicted.

[7] In the courts below, the Bureau did not deny that under the substantive tort law of Washington, the government would be liable. *See*

The Ninth Circuit affirmed on the ground that the misrepresentation exception barred the action. It did not reach the issue of discretionary function immunity.[8] Appendix A, pages A-1 through A-5.

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e.g. Brown v. MacPhersons, 86 Wash.2d 293, 545 P.2d 13 (1975); *Riskad v. Holmberg,* 76 Wash.2d 265, 456 P.2d 355 (1969); *Garrard v. Seifert,* 22 Wash.App. 476, 591 P.2d 809 (1979). Liability was therefore assumed in the courts below, and the focus of the argument was on the FTCA immunities.

[8] Since the Ninth Circuit did not reach the issue of whether the discretionary function immunity of the FTCA is applicable, this Court, in accordance with its ordinary practice, generally will not address this issue. *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 697 (1984). However, this Court may reach the issue notwithstanding the Court of Appeals' failure to do so, when, as here, the District Court reached the issue, the parties fully briefed the issue and the issue involves the application of law to findings of fact made by the District Court. *E.g. Capital Cities Cable, Inc. v. Crisp,* 467 U.S. at 697-698; *New York City Transit Authority v. Beazer,* 440 U.S. 568, 583 n.24 (1979). With this possibility in mind, petitioners shall concisely demonstrate why discretionary immunity is inapplicable.

This Court has held that discretionary immunity applies only to decisions of basic policy, and not to routine administration. *See Dalehite v. United States,* 346 U.S. 15, 35-36 (1953); *United States v. S.A. Epresa De Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 813 (1984). A careful analysis of the critical 1977 events clearly isolates the key act: the erroneous computation of the TWSA. There was no discretion or exercise of choice in this calculation process. The Bureau was required by the Consent Decree (Appendix F) to determine the TWSA. It was then simply a question of the application of the correct formula.

Although management of the Yakima Project has involved discretionary decisions, these policy decisions were made decades ago. The entire system has been operating under those decisions at least since the 1945 Consent Decree. The Bureau's error was the misapplication of an inflexible formula involving fixed, ascertainable standards. See Appendix G, page A-109.

Furthermore, it is significant that the government here was acting as the primary negligent party, rather than in its role as a regulator. In *Varig Airlines,* this Court stressed that the discretionary function ex-

The majority opinion mischaracterized the gravamen of petitioners' claims as "reliance on the communication of misinformation[.]" Appendix A, page A-4. Proceeding from this erroneous premise, the court ruled for the United States on the basis of a reported Ninth Circuit decision, *Green v. United States,* 629 F.2d 581 (9th Cir. 1980).

Green recognized that cases construing the misrepresentation exception "may not be fully reconciliable[.]" 629 F.2d at 585. Under *Green,* "the misrepresentation exception precludes liability where the plaintiff suffers economic loss as a result of a commercial decision which was based on a misrepresentation by the Government consisting either of false statements or a failure to provide information which it had a duty to provide." Appendix A, page A-3, *citing* 629 F.2d at 584-585. In relying upon *Green,* the Ninth Circuit pointedly declined to follow this Court's supervening decision in *Block v. Neal,* 460 U.S. 289 (1983). *See* Appendix A, page A-4.

Judge Harry Pregerson, in concurrence, reluctantly joined the majority opinion because he felt bound by "the broad sweep" given to the misrepresentation exception in *Green.* Appendix A, page A-4. However, he criticized the result as "unjust", especially given the Farmers' "reliance on the government justified by a long-standing relationship." Appendix A, pages A-4, A-5. Judge Pregerson also implicitly questioned *Green* by expressing "doubt that Congress intended to shield the government from liability for ruining the livelihood of farmers who depended entirely on a government official's rote application of a straightforward mathematical computation." Appendix A, page A-5.

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emption was "intended to encompass the discretionary acts of the government acting in its role as a regulator of the conduct of private individuals." *Id.* In *Varig Airlines,* the government's function was regulation and inspection, clearly discretionary. Here, in contrast, the Bureau was the primary actor and was simply to apply the correct inflexible formula, clearly *not* discretionary.

Finally, the Farmers and the Bureau stand in a special relationship of trust. This dictates a limited application of the discretionary function immunity. *See* Statement of the Case, part A, and part III, *infra.*

Petitioners subsequently filed a petition for rehearing with suggestion for rehearing *en banc* which was denied. In its petition, petitioners joined in a formal request by the United States in requesting the Ninth Circuit to publish the decision. This request was also denied.

BASIS OF JURISDICTION IN THE UNITED STATES DISTRICT COURT

The District Court had jurisdiction pursuant to 28 U.S.C. § 1346(b) and the FTCA, 28 U.S.C. §§ 2674 *et seq.*

ARGUMENT

I

THE NINTH CIRCUIT ERRED IN HOLDING THAT GROSS NEGLIGENCE IN COMPUTING IRRIGATION WATER SUPPLY (HYDROLOGICAL MALPRACTICE) IS IMMUNIZED UNDER THE MISREPRESENTATION EXCEPTION TO THE FTCA, 28 U.S.C. § 2680(h)

A. The Bureau Negligently Made A *De Facto* Allocation of the Irrigation Water Supply

The Bureau's conduct involved straightforward hydrological malpractice. The primary error of the Ninth Circuit can easily be isolated. The Ninth Circuit focused on the *announcement* of the operational negligence, rather than on the negligence itself.

This controversy centers on extant water. The announcement was incidental and peripheral to the operational negligence. As Project Superintendent of the Yakima Project William Gray conceded in a new article, "[t]here was water in the system that we didn't know we had, and hadn't computed before. It's as simple as that—we blew it." Appendix K, pages A-144 through A-145.

What the Bureau did, in early 1977, was a *de facto* allocation of the TWSA. The Bureau, which *controlled* the water, was saying to the Farmers, who *owned* the water at the critical time of the year when the Farmers make planning decisions: "This is how much of your water we are going to release to you this year."

In its opinion, the Ninth Circuit stated that had the Bureau negligently failed to deliver adequate water the result might be different.[9] ***But that is precisely what the Bureau failed to do.*** The fact that the Farmers actually received adequate water at year's end is irrelevant, when it is the *de facto* allocation in February, which determines the extent of the Farmers' crops for the entire year.[10] In effect, the Bureau negligently failed, through hydrological malpractice, to deliver water to the Farmers in February.

B. This Is Not A Weather Forecasting Case

Contrary to the Ninth Circuit's erroneous characterization, this is not a weather forecasting case. *See* Appendix A, p. A-2. The shocking differential between the water that the Bureau announced would be available in early 1977, and the water that proved to be available, was not caused either by faulty weather forecasting or by an unpredictably heavy rainfall after the February 1977 computation.[11]

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[9] Appendix A, page A-2.

[10] Although the deliveries of irrigation water did not actually begin until April, ***it is conceded by the Bureau*** that the Farmers must plan the type and amount of crops which they will plant and make other vital decisions as to their farming plans in February or March. C.R. (Court Record in the Ninth Circuit) 37, Gray Dep., Vol. 1, p. 53, Vol. 2, pp. 103-104; Perala Dep., Vol. I, pp. 19, 62; *see also* C.R. 39, Yribar Claims Court Affidavit, pp. 4-5; C.R. 22, Yribar District Court Affidavit, pp. 5-6; C.R. 37, Gray Dep., Vol. 1, p. 53 Vol. 2, p. 154; Perala Dep., Vol. 1, p. 19; Vinsonhaler Dep., pp. 15-16.

In mid-May:

> "[i]t was apparent . . . that the water supply available and the demand were seriously out of balance." Vissia Report, Appendix E, page A-61.

A recomputation of the TWSA, with the appropriate return flow computation, then fully exposed the tragic error. By then, it was too late for the Farmers to avoid the catastrophe.

[11] As demonstrated by Table 3 in the Vissia Report (Appendix E., page A-55), the aggregate rainfall at five project stations from February through May 1977, was 52.21 inches, as compared to a normal aggregate for the same five stations of 69.81 inches.

Moreover, those who rely on a governmental weather forecaster do so voluntarily. They can turn to media forecasters, or hire their own forecasters if they choose. They can cancel or reschedule activities.

The Farmers here had no such choice.

The government had custody of the water. The government controlled the water. The Farmers were utterly dependent upon the Bureau.

Finally, unlike weather forecasts, computation of the TWSA involves fixed and ascertainable standards, (Appendix G, page A-109), not unknown elements.

II

AN INTOLERABLE CONFLICT BETWEEN CIRCUITS EXISTS AS TO THE UNITED STATES' LIABILITY FOR MALPRACTICE IN THE PERFORMANCE OF OPERATIONAL TASKS, NOTWITHSTANDING THE FTCA'S MISREPRESENTATION EXCEPTION

The Ninth Circuit's decision below conflicts with the position of five other circuits that the FTCA's misrepresentation exception does not bar liability for malpractice in the performance of operational tasks. By rejecting a claim for hydrological malpractice, the Ninth Circuit has placed itself squarely in conflict with five other circuits which hold actionable substantially similar types of malpractice committed in the performance of operational tasks.

This conflict is an intolerable one which should be resolved by a grant of certiorari. The Ninth Circuit's aberrant decision frustrates the FTCA's intent. It also endangers the livelihood of water-dependent farmers throughout the Western United States, who stand in a special trust relationship with the Bureau.

The Ninth Circuit should not be allowed to inflict such injustice through adjudication by unpublished decision. The result here, which the concurring judge below denounced as "unjust" and ruinous to "the lifeblood of the farming economy of the Yakima Valley" (Appendix A, pages A-4 through A-5), tragi-

cally confirms the warning by Justices Stevens, Brennan and Marshall that, due to the increased use of unpublished opinions and other judicial shortcuts, "[t]he threat to the quality of our work that is presented by the ever-increasing impersonalization and bureaucratization of the federal judicial system is far more serious than is generally recognized." *Board of Educ. of Rogers, Ark. v. McCluskey*, 458 U.S. 965, 972 (1982) (Stevens, Brennan and Marshall, J.J., dissenting).

The cursory memorandum filed below demonstrates starkly that the Ninth Circuit misconceived both the importance of the issues presented and the pervasive impact of this multi-million dollar case on users of Bureau-managed waters throughout the Western United States. Immediate review by this Court is necessary to restore stability to the law and to the Bureau's relationship of trust with farmers and other water users in the United States.

A. Unlike the Ninth Circuit, Five Other Circuits Uphold Liability For Malpractice In The Performance of Operational Tasks

Until the decision below, it was clear that the misrepresentation exception does not immunize the United States from liability for negligently performed operational tasks, even when a collateral communication of misinformation is involved, as is almost always the case. This rule has been consistently applied by the First,[12]

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[12] *Jimenez-Nieves v. United States*, 682 F.2d 1, 3-5 (1st Cir. 1982) (clerical error in Social Security records communicated to other government agencies).

Second,[13] Third,[14] Fifth,[15] and Eighth[16] Circuits and even by the Ninth Circuit,[17] in cases involving aviation disasters, administrative clerical errors, and professional malpractice.

The leading case establishing the rule is *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.), *cert. denied* 389 U.S. 931 (1967). The Second Circuit upheld judgment against the United States for damages arising from an airline accident caused by the failure to transmit accurate weather information. The court so held on the ground that "[w]here the gravamen of the complaint is the negligent performance of operational tasks, rather than misrepresentation, the government may not rely upon . . . [the misrepresentation exception] to absolve itself of liability." 373 F.2d at 239 (collecting cases).

The Fifth Circuit shortly therafter adopted an identical rationale articulated by the district court in *Sullivan v. United States*, 411 F.2d 794 (5th Cir. 1969) (per curiam), *affirming with adoption of opinion*, 299 F.Supp. 621, 624-628 (N.D. Ala. 1968). *Sullivan* affirmed a judgment for damages arising from an airplane crash caused by the pilot's use of an erroneous aviation chart supplied by the United States. The Fifth Circuit adopted

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[13] *Ingham v. Eastern Airlines, Inc.*, 373 F.2d 227, 238-239 (2d. Cir.) *cert. denied* 389 U.S. 931 (1967) (negligent failure to convey weather information).

[14] *Cross Brothers Meat Packers, Inc. v. United States*, 705 F.2d 682, 683 (3d Cir. 1983) (negligent meat inspection).

[15] *Matthews v. United States*, 456 F.2d 395 (5th Cir. 1972) (legal malpractice); *Sullivan v. United States*, 411 F.2d 794 (5th Cir. 1969) (per curiam), *affirming with adoption of opinion*, 299 F.Supp. 621, 624-628 (N.D. Ala. 1968) (negligent preparation and distribution of erroneous aviation chart).

[16] *National Carriers, Inc. v. United States*, 755 F.2d 675, 676-677 (8th Cir. 1985) (negligent meat inspection).

[17] *Guild v. United States*, 685 F.2d 324, 326 (9th Cir. 1982) (engineering malpractice); *Ramirez v. United States*, 567 F.2d 854, 856 (9th Cir. 1977) (*en banc*) (medical malpractice). The Ninth Circuit panel below, however, ignored this authority.

the district court's holding that the preparation and distribution of the erroneous chart was a negligently performed operational task which was actionable notwithstanding the misrepresentation exception. 299 F.Supp. at 625-626. There, as here, the collateral communication of misinformation could not immunize the government from liability.

Recent authority demonstrates the continued adherence to this rule by courts other than the Ninth Circuit. In *National Carriers, Inc. v. United States,* 755 F.2d 675, 677 (8th Cir. 1985), the Eighth Circuit held that the misrepresentation exception afforded no immunity from liability when a meat inspector's statement that beef samples were "all the same" resulted in the commingling of contaminated and uncontaminated beef. There, as here, the injury arose following the government's collateral communication of misinformation. Liability nevertheless rested upon the breach of the inspector's duty to identify the contaminated beef.

The First Circuit likewise refused to apply the misrepresentation exception to a claim arising from the termination of a plaintiff's Social Security benefits due to a keypuncher's typographical error misstating the plaintiff's benefits eligibility. *Jimenez-Nieves v. United States,* 682 F.2d 1, 3-5 (1st Cir. 1982). Rejecting an expansive interpretation of the exception, the court could "discern no congressional purpose that might have been served in defining . . . [the exception] more broadly to include false statements that are happenstance causal elements of other torts." *Id.* at 5.

A year after *Jimenez*, this Court recognized that misrepresentation and negligence have overlapping legal and factual questions, but cautioned against mechanical analysis. *Block v. Neal,* 460 U.S. 289, 298 (1983). This Court emphasized that "the partial overlap between these two tort actions does not support the conclusion that if one is excepted under the Tort Claims Act, the others must be as well." *Id.*

The decision below clearly shows that the Ninth Circuit is ignoring this common-sense approach. The gravamen of the complaint here is not misrepresentation. It is the Bureau's breach of its duty of competent hydrological computation and allocation

of irrigation water supply, pursuant to a formula established by a Consent Decree and related contracts. The Ninth Circuit, however, misconceivied and rejected petitioners' claim through precisely the type of mechanical analysis disapproved in *Block*.

B. The Ninth Circuit's Novel Contrary Position Frustrates the FTCA's Purposes

The Ninth Circuit's unprecedented expansion of the misrepresentation exception frustrates the FTCA's purposes, and flouts the constructional principles articulated by this Court and followed by other circuits. The FTCA's purposes are "to mitigate unjust consequences of sovereign immunity"[18], and to impose upon the United States "the obligation to pay damages" for employee negligence in "carrying out its work."[19] This Court accordingly has directed that, because "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute," an exception should apply only to " 'those circumstances which are within the words and reasons of the exception'—no less and no more." *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984) (collecting cases).

By ignoring these directives, the Ninth Circuit frustrated the FTCA's intent. The exception threatens to consume the rule. In plain violation of the policy established by Congress and this Court, the Ninth Circuit has "encourage[d] the Government to shield itself completely from tort liability by adding misrepresentations to whatever otherwise actionable torts it commits." *Block v. Neal*, 460 U.S. at 298. If allowed to stand, the decision below will enable the misrepresentation exception to devour the general rule of liability mandated by Congress.

C. Immediate Review Will Prevent Repetition Throughout The Nation of the Injustice Perpetrated Here

Review by this Court therefore is necessary now. This is not a fact-bound case. This is a case of catastrophic injustice which is capable of repetition and threatens reclamation water users

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[18] *Feres v. United States*, 340 U.S. 135, 139 (1950).

[19] *Dalehite v. United States*, 346 U.S. 15, 24, 31, (1953).

throughout the United States. The Bureau will rely on it. Stability and trust have been replaced by instability, suspicion and confusion.

Lower court rulings over a 20-year period have resulted in an inter-circuit conflict concerning the interplay of the misrepresentation exception and operational negligence. The time has come for a definitive ruling on these issues. Certiorari accordingly should be granted to resolve the intolerable inter-circuit conflict created by the Ninth Circuit's decision.

III

THE NINTH CIRCUIT'S DECISION SQUARELY CONFLICTS WITH *INDIAN TOWING CO. V. UNITED STATES*, 350 U.S. 61 (1955) AND *BLOCK V. NEAL*, 460 U.S. 289 (1985)

The Ninth Circuit's decision below squarely conflicts with this Court's decisions in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) and *Block v. Neal*, 460 U.S. 289 (1983). These decisions collectively establish that negligence in the performance of an operational duty, or negligence in the performance of a voluntary undertaking, is actionable under the FTCA, notwithstanding the misrepresentation exception, even when the plaintiff relies upon the government's collateral communication of misinformation. The Ninth Circuit's failure to follow *Indian Towing* and *Block* makes appropriate a grant of this petition and a summary reversal.

A. Indian Towing v. United States

Indian Towing originated the "Good Samaritan" doctrine of FTCA liability which is one of the Farmers' assertions here. This case, however, involves much more than a mere voluntary undertaking by the United States. This case involves a special trust relationship, and the *Indian Towing* rationale therefore applies *a fortiori* here.

Indian Towing ruled actionable damages to a vessel resulting from the Coast Guard's failure to maintain a lighthouse beacon. 350 U.S. at 64-70. The court reasoned from the premise of

"hornbook tort law" that "one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." *Id.* at 64. The court therefore held that the government would be liable under the FTCA if, after engendering reliance upon the lighthouse services which it voluntarily undertook to provide, it failed to maintain the beacon light or to warn of its malfunction. *Id.* at 69. *Indian Towing* presents a basis for liability which is outside of all FTCA exceptions, and which is independent of other bases of liability asserted by the Farmers.

B. Block v. Neal

Indian Towing did not address the applicability of the misrepresentation exception to the Good Samaritan liability doctrine. In *Block v. Neal,* however, this Court unanimously held that the misrepresentation exception affords no refuge from Good Samaritan liability, even if a collateral communication of misinformation is involved, *when, as in the instant case, the plaintiff alleges the breach of a duty other than the duty to use due care in communicating information.*

Block held that the misrepresentation exception "does not bar negligence actions which focus not on the government's failure to use due care in communicating information, but rather on the government's breach of a different duty," even if the claim involves "an element of reliance" upon a "voluntary undertaking" by the government. 460 U.S. at 297 and n. 7. The Farmers Home Administration (FmHA) had undertaken to supervise, inspect, and approve the construction of FmHA-financed homes. The plaintiff purchased in reliance upon an FmHA appraisal statement, which negligently failed to note numerous construction defects. He subsequently sued under the Good Samaritan doctrine articulated by *Indian Towing* and by the Restatement (Second) of Torts § 323 (1965).

This Court held actionable the breach of the FmHA's duty of supervision and inspection, notwithstanding the plaintiff's reliance upon the FmHA appraisal statement. *Id.* at 294-299. This Court so concluded on the ground that the operational duty of supervision and inspection was "distinct from any duty to use due care in

communicating information[.]" *Id.* at 297. This Court accordingly held that the "claim under the Good Samaritan doctrine is not barred by the misrepresentation exception to the Tort Claims Act[.]" *Id.* at 295 n. 4.

C. The Ninth Circuit Should Have Followed Indian Towing and Block

Indian Towing and *Block* squarely control here. In this case, as there, the petitioners allege the negligent performance of a duty voluntarily undertaken by the Government. Like the petitioners there, the Farmers here are completely dependent upon the competent performance of the duty. The duty consists of a hydrological computation and *de facto* allocation of irrigation water supply. In the words of Judge Pregerson, the concurring judge below, the duty involves merely "the rote application of a straightforward mathematical computation." Appendix A, page A-5.

The duty to perform this rote computation and *de facto* allocation competently is, like the duty of supervision in *Block,* a duty distinct from any duty accurately to convey information. The government's breach of duty here constituted hydrological malpractice. This is the gravamen of the Farmers' complaint.

The Ninth Circuit completely ignored *Indian Towing,* and refused to follow *Block.* It did so on the mistaken premise that the gravamen of the Farmers' complaint is the communication of misinformation to the Farmers' economic detriment. Appendix at A, page A-4.

The court admitted that *Block* would control "if the Bureau had negligently failed to deliver adequate water[.]" Appendix A, page A-4. A negligent failure of adequate delivery is *precisely* what occurred here. A TWSA computation, such as that which gave rise to this action, is in practical effect an annual allocation of irrigation water supply. It enables the Farmers to plan for the growing season. The result below thus was inconsistent with *Block* even under the Ninth Circuit's own interpretation of the decision.

The Ninth Circuit's utter disregard of *Indian Towing* and its misapplication of *Block* resulted in a grave injustice which is

capable of repetition throughout the water-dependent Western United States. For this reason alone, a grant of certiorari and a summary reversal therefore are appropriate.

IV

THE NINTH CIRCUIT ERRED IN FAILING TO CONSIDER THE SIGNIFICANCE OF THE SPECIAL TRUST RELATIONSHIP BETWEEN THE BUREAU AND THE FARMERS

A. This Case Presents An Important Question Of Federal Law Which This Court Has Not Decided

This Court has acknowledged for almost half a century that the Bureau and Farmers stand in a special trust relationship. The Farmers are wholly dependent on the Bureau's good faith in that relationship. (See Statement of the Case, part A, for a discussion of case law recognizing this relationship.) The concurring judge below recognized the key elements of such a relationship, which the majority did not: that the Bureau has exclusive control over the distribution of the Farmer's irrigation water to them—water which is essential for their livelihood. "The Farmers' economic fate rested entirely in the government's hands." Appendix A, pages A-4 through A-5. Yet, the Ninth Circuit completely disregarded the effect of this relationship, treating this case as a garden variety commercial transaction between parties dealing at arms length. Appendix A, page A-4.

The full nature of the rights and duties of the Bureau and the Farmers (and other Farmers and water users throughout the West) under the Reclamation Act of 1902, 43 U.S.C. § 371 *et seq.* presents important questions of federal law that have not, but should be decided. If the Bureau is immunized from FTCA liability, and thus is unaccountable for its actions, the consequences will be disastrous for reclamation in the United States.

If allowed to stand, this harsh decision, which was widely publicized, will undoubtedly embolden the Bureau to pay less scrupulous heed to the rights of water users than it previously has. Trust, which previously existed between the Bureau and water

users throughout the country and particularly the arid West, will be eroded.

The rights and duties of the Bureau and water users need to be defined with clarity. Only this will restore the reciprocal trust necessary to make reclamation work. Relations between the Bureau and Farmers in the Yakima Basin are currently in a state of rupture. Review by this Court is needed to restore trust and confidence, and tell the Farmers that there is a remedy for the wrong they suffered, and that there will be further remedies if such wrongs are repeated.

B. The Farmers' Loss Did Not Arise In A Commercial Context

The Ninth Circuit simplistically mischaracterized this case as one in which "the plaintiff suffers economic loss as a result of a commercial decision", and accordingly held there was no liability. Appendix A, page 3. In erroneously pigeonholding this case as a "commercial" one, the Ninth Circuit misapplied precedent and, as lamented by Judge Pregerson, failed to fairly consider the underlying special trust relationship between the Bureau and the Farmers.

The argument that the misrepresentation exclusion is inapplicable here because the Farmers' loss was commercial has its genesis in *United States v. Neustadt,* 366 U.S. 696, 711 n. 26 (1961). *Neustadt* limits the exemption to the precise tort of deceit in a narrow context such as the passing of and bargaining for money, indentures, securities, bills, notes, and other transactions effecting "the invasion of interests of a financial or commercial character, in the course of business dealings." *Id.*

The Seventh Circuit has correctly held how narrow this exception is, finding that inducement with the hope of gain is the hallmark of a misrepresentation.

> There must still be a deliberate effort to get something of value by a representation that is false, only the person making the representation need not know that it is false. . . .
>
> A financial misrepresentation is more likely to involve the hope of gain than a misrepresentation relating to safety.

Krejci v. U.S. Army Material Development Readiness Command, 733 F.2d 1278, 1281 (7th Cir. 1984).

Deceit is not alleged here. The harm did not come to the Farmers in the course of arms length financial and commercial business dealings. The Bureau was not motivated by gain. It did not seek to induce the Farmers to act in a way beneficial to the Bureau. The Farmers' loss came through hydrological malpractice at the operational level, in the course of a special trust relationship.

The Ninth Circuit's disregard of this pivotal fact led to its misplaced reliance upon *Green v. United States,* a case which conceded that decisions construing the misrepresentation exception are not fully reconcilable. 629 F.2d at 585. *Green* held the government immune under the misrepresentation exception for misstatements and omissions in a letter sent to cattle owners concerning pesticide hazards. The court so held on the ground that the plaintiffs' losses were "economic" and arose in a "commercial" setting. *Id.* at 584-585. The court reasoned that the misrepresentation exception bars liability for economic losses resulting from commercial decisions based on government misstatements or omissions. *Id.*

Green is factually inapposite. Assuming *arguendo* that *Green* correctly characterized the setting there as "commercial", the setting here is totally different. As explained above, this is not a commercial case. This case instead involves gross negligence in the performance of an operational duty, which clearly is actionable.

Green also is questionably reasoned. *Green* does not stand up under the guidelines subsequently articulated by this Court in *Block v. Neal.* After *Block,* it is untenable to conclude, as *Green* did, that the particular type of damages claimed necessarily determines liability under the FTCA. The foundation upon which the Ninth Circuit based its decision below thus was a mirage.

Taken to its logical conclusion, the Ninth Circuit's decision in this case would swallow FTCA liability, for every loss by necessity includes damage to financial or monetary interests. It is true that, for purposes of prosecuting this action, the Farmers must trans-

late their losses into financial (monetary) terms. However, the same is true of wrongful death, personal injury, medical malpractice, and all other theories that can be asserted under the FTCA.

Monetary damages is the remedy the Act provides. This does not mean that losses which do not result from a commercial transaction between the Bureau and the Farmers are in a "commercial or financial" context within the usage of *Neustadt. Cf. Connelly v. State of California*, 3 Cal.App.3d 744, 752, 84 Cal. Rptr. 257 (1970).

The Ninth Circuit fundamentally erred in neglecting to decide this case on the basis of the trust relationship between the Farmers and the Bureau. Many circuits are also more hesitant to apply the misrepresentation exception to cases involving fiduciary or trust relationships such as airline cases and medical and legal malpractice cases. (*See* Argument II, *supra.*) However, where the parties deal in an ***arms length*** bargaining position, liability is usually more circumscribed.

Here, the Bureau is like a common carrier of the water. It has exclusive control over the distribution of the Farmers' irrigation water to them. This water is essential to the Farmers' livelihood. They cannot obtain this water from any other source. Thus, this relationship, similar to that between an air traffic controller and airline, doctor and patient, or attorney and client, mandates accountability and thus liability. Review is necessary for the future well-being of irrigation systems throughout the West.

CONCLUSION

Petitioners respectfully request that this Court issue a Writ of Certiorari to review the Ninth Circuit's judgment.

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Respectfully submitted,

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